

BEFORE THE
PHYSICAL THERAPY BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	Case No. 1D-2001-62795
STEPHAN KUMMER, JR.,	OAH No. L2002070026
Respondent.	

PROPOSED DECISION

On February 13, 2003 Administrative Law Judge Timothy S. Thomas, Office of Administrative Hearings, heard this matter in Los Angeles, California.

Mia Perez-Argote, Deputy Attorney General, represented complainant, the Executive Officer of the Physical Therapy Board of California (hereinafter the board).

Richard H. Bitters, Attorney at Law, represented Stephan Kummer, Jr. (hereinafter respondent, or Kummer).

Respondent renewed a motion to continue the hearing so that counsel, who had only recently been retained, could obtain a forensic psychological consultation. The presiding judge had previously denied an identical request. The motion was denied.

The record was held open until March 6, 2003 to allow respondent to submit letters of reference on or before February 27, 2003. Respondent's request to also submit a psychologist's report was denied. The board was given until March 6, 2003 to submit written comments in response to the letters of reference. On February 26, 2003 the Office of Administrative Hearings received copies of letters of reference from Robert R. Huhn, Sonia Hoover, Daniel Padilla, Marc Reisman and Jennifer Brown, which were marked, collectively, as Exhibit 9. No response was filed by complainant.

The matter was submitted on March 6, 2003.

FACTUAL FINDINGS

1. Steven K. Hartzell, Executive Director of the board, filed the Accusation in his official capacity.

2. The board issued license number AT 4636 to respondent on December 19, 1996. The license permits respondent to perform the duties of a physical therapist assistant. Respondent currently works for an organization named Human Performance Center, where he sees 15 to 20 patients daily and leads group exercise programs.

3. On January 20, 1993 respondent was convicted in the Santa Barbara Municipal court by a plea of nolo contendere of violating Vehicle Code section 23152(a), driving under the influence of alcohol. His blood alcohol content at the time of his arrest on November 14, 1992 was .19. He spent the night of his arrest in jail, spent three additional days doing community service work, was fined and paid \$1,300, and was placed on probation for three years. While on probation respondent completed a court-ordered counseling program for first-time offenders.

4. On March 19, 2000 two Santa Barbara County Sheriff's Department deputies observed respondent in an intoxicated state on a public sidewalk near a bar where Kummer had been drinking. Respondent admitted he had been drinking and should not drive. He indicated he lived nearby and would walk home. A short while later the deputies observed respondent get into his vehicle and start the engine. The deputies got respondent's attention before the car moved, and respondent turned off the engine and exited the car. The deputies gave Kummer a second warning, and respondent agreed to call his father for a ride. Within five minutes the deputies again observed respondent in the driver's seat of his car, and this time saw him move the car out of its parking space, nearly striking their patrol vehicle. In the course of making an arrest, Kummer became belligerent. The arresting officers had to call for backup and use a spray of some type to control their suspect, who was and is very muscular. At one point respondent threatened to kill one of the officers.

5. Respondent's blood alcohol content on March 19, 2000 was .14. On June 8, 2000 respondent pleaded no contest to violating Vehicle Code section 23152(b), driving with a blood alcohol content of .08 or higher, and to a violation of Penal Code section 415, disturbing the peace. A resisting arrest charge was dismissed as part of a plea bargain. The Santa Barbara Superior Court placed Kummer on probation for three years, on condition that he spend one day in jail (respondent was given credit for time served), pay fines and assessments totaling \$1,425, and again attend a counseling program for first-time offenders.

6. The crimes committed by respondent are substantially related to the qualifications, functions or duties of the licensed activity.

7. Respondent claims that he has always been an infrequent drinker, and has not consumed any alcohol since March 19, 2000. While he denies he is an alcoholic, he admits that he becomes “irresponsible,” “uncontrollable,” a dangerous driver and “an asshole” whenever he drinks. Kummer is a serious and competitive body-builder and has pledged to never drink again. He is engaged to be married and participates in the care of his fiancé’s child. His demeanor while testifying and his attitude toward the proceedings were consistent with his expressions of remorse and his expressed determination to avoid recidivist conduct.

8. The letters of reference submitted on respondent’s behalf are very articulate and certainly impressive in their fervor for respondent’s cause. One of the letters is from his supervisor, the owner/director of Human Performance Center, who uses adjectives such as dependable, productive, industrious, conscientious, skillful, creative, dedicated and disciplined in his appraisal of respondent. Colleagues add positive, compassionate, knowledgeable and professional to the description.

9. There is no evidence that respondent has ever consumed alcohol at or immediately prior to working, or that he has ever harmed a patient. This is his first license disciplinary experience, and one of the convictions is more than 10 years old. But there is understandable concern, as expressed by complainant’s counsel at the hearing, that respondent, while sincere, denies his alcoholism and focuses on the monetary consequences of his conduct and these proceedings. Respondent has not sought counseling unless ordered by the courts, and has not considered seeking the help of Alcoholics Anonymous or a similar program. On balance, this is an appropriate case to impose discipline so that the public may be protected, in advance of further problems, by reasonable probationary conditions.

10. The board has reasonably incurred \$2,772 in costs of investigation and prosecution of this matter.

LEGAL CONCLUSIONS

1. A board may suspend or revoke or place on probation a license on the ground that the licensee has been convicted of a crime if the crime is substantially related to the qualifications, functions or duties of the licensed activity. (Business and Professions Code section 490.) A plea of nolo contendere constitutes a conviction for purposes of imposing discipline in an administrative proceeding. (Business and Professions Code section 2661.)

Although no case has been found involving a physical therapist, counsel cites two cases holding that convictions for driving under the influence of alcohol “have a logical connection to a physician’s fitness to practice medicine,” and “reflect a lack of sound professional and personal judgment that is relevant to a physician’s fitness and competence to practice medicine. Alcohol consumption quickly affects normal

driving ability, and driving under the influence of alcohol threatens personal safety and places the safety of the public in jeopardy. It further shows a disregard of medical knowledge concerning the effects of alcohol of vision, reaction time, motor skills, judgment, coordination and memory, and the ability to judge speed, dimensions, and distance ... Driving while under the influence of alcohol also shows an inability or unwillingness to obey the legal prohibition against drinking and driving and constitutes a serious breach of a duty owed to society ... [I]t is not necessary for the misconduct forming the basis for discipline to have occurred in the actual practice of medicine.” (Griffiths v. Superior Court, 96 Cal. App. 4th 757 (2002). The California Supreme Court reached similar conclusions in In re Kelley, 52 Cal. 3d 487 (1990), involving an attorney twice convicted of driving under the influence. In both cases the respondents were placed on probation.) The reasoning of these cases applies here and confirms the nexus between the convictions and the licensed activity.

2. Cause exists to discipline respondent’s physical therapist license number AT 4636 pursuant to Business and Professions Code section 490 and 2660(d), in that respondent was convicted of crimes substantially related to the qualifications, functions and duties of the licensed activity, based on Factual Findings 3 through 6.

3. The board may order respondent to pay the actual and reasonable costs of investigation and prosecution of this matter pursuant to Business and Professions Code section 2661.5.

ORDER

Respondent’s physical therapist license number AT 4636 is hereby revoked. The revocation is stayed for a period of three years on the following terms and conditions:

1. Respondent shall obey all federal, state and local laws, and statutes and regulations governing the practice of physical therapy in California.

2. The respondent shall be in compliance with any valid order of a court. Being found in contempt of any court may constitute a violation of probation.

3. Respondent must not violate any terms and conditions of criminal probation and be in compliance with any restitution ordered. Respondent shall submit a declaration under penalty of perjury on a form provided by the board stating whether he has successfully completed the probation in Santa Barbara Superior Court case number 1011115.

4. Respondent shall comply with the board’s probation monitoring program, and shall appear in person for interviews with the board, or its designee, upon request at various intervals and with reasonable notice.

5. Respondent shall notify all present and future employers of the reason for and the terms and conditions of the probation by providing a copy of the Accusation and the Decision and Order to the employer. Respondent shall obtain written confirmation from the employer that the documents were received. If the respondent changes, or obtains additional employment, he shall provide the above notification to the employer and submit written employer confirmation to the board within 10 days. The notification(s) shall include the name, address and phone number of the employer, and, if different, the name, address and phone number of the work location.

6. Respondent shall notify the board, in writing, of any and all changes of name or address within 10 days.

7. Respondent may practice or perform physical therapy in a supervised structured environment. Respondent shall not work for a temporary services agency or registry without the express, written permission of the board.

8. Respondent may not use aliases and shall be prohibited from using any name which is not his legally-recognized name or based upon a legal name change.

9. If respondent works less than 192 hours in a period of three months, those months shall not be counted toward satisfaction of the probationary period. The respondent shall notify the board if he works less than 192 hours in a three month period.

10. The period of probation shall run only during the time respondent is practicing within the jurisdiction of California. If, during probation, respondent does not practice within California, he is required to immediately notify the probation monitor in writing of the date that his practice is out of state, and the date of return, if any. Practice by respondent in California prior to notification to the board of his return will not be credited toward completion of probation. Any order for payment of costs recovery shall remain in effect whether or not probation is tolled.

11. If respondent violates probation in any respect, the board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation or Petition to Revoke Probation is filed against respondent during probation, the board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

12. Following the effective date of this probation, if respondent ceases practicing as a physical therapy assistant due to retirement, health or other reasons respondent may request to surrender his license to the board. The board reserves the right to evaluate respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the

circumstances. Upon formal acceptance of the tendered license, the terms and conditions of probation shall be tolled until such time as the license is no longer renewable, the respondent makes application for the renewal of the tendered license or makes application for a new license.

13. Respondent shall abstain completely from the use of alcoholic beverages.

14. Respondent shall immediately submit to biological fluid testing, at respondent's cost, upon the request of the board or its designee.

15. Within 60 days of the effective date of this Decision, and on a periodic basis thereafter as may be required by the board or its designee, respondent shall undergo a psychiatric/psychological evaluation (and psychological testing, if deemed necessary) by a board-appointed psychiatrist/psychologist, who shall furnish an evaluation report to the board or its designee. Respondent shall pay the cost of the evaluation.

If respondent is required by the board or its designee to undergo psychiatric/psychological treatment, respondent shall within 30 days of the requirement submit to the board for its prior approval the name and qualifications of a psychiatrist/psychologist of his choice. Respondent shall undergo and continue treatment until further notice from the board or its designee. Respondent shall have the treatment provider submit quarterly status reports to the board or its designee indicating whether the respondent is capable of practicing physical therapy safely.

The board shall also have the option, based upon the evaluation of the board-appointed psychiatrist/psychologist, to refer respondent to the board's diversion program.

16. Respondent shall reimburse the board the sum of \$2,772 for actual and reasonable costs of investigation and prosecution of this matter. Payment shall be made within 90 days of the effective date of this Decision unless the board or its designee agrees in writing to payment by an installment plan. Failure to make the ordered reimbursement, or any agreed payment, may constitute a violation of the probation order.

17. Upon successful completion of probation, respondent's license shall be fully restored.

DATED: March 12, 2003

__Original signed by Timothy S. Thomas __
TIMOTHY S. THOMAS
Administrative Law Judge
Office of Administrative Hearings

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PHYSICAL THERAPY BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

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STEPHEN KUMMER, JR.)	
)	
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_____)	

The foregoing Proposed Decision, in case number 1D 2001 62795, is hereby adopted by the Physical Therapy Board, Department of Consumer Affairs, State of California.

This decision shall become effective on the 5th day of May, 2003.

It is so ordered this April 4, 2003 .

Original Signed By
Ellen Wilson, P.T., President
Physical Therapy Board
of California